No. 2742.

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK R. McCORMICK, as Receiver of the FIRST NATIONAL BANK OF SALMON, a Corporation,
Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, FRED G. HAVEMANN, JOHN LOTTRIDGE, and E. S. EDWARDS,
Appellees.

PETITION FOR REHEARING OR FOR MODIFICATION OF THE ORDER OF THIS COURT.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

RICHARDS & HAGA,
Solicitors for Petitioner and Appellee,
Guy E. Bowerman.
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To the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Guy E. Bowerman, one of the appellees in the above entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause, and your petitioner especially claims error in the decision filed herein in the following particulars:

1. This Honorable Court erred in reversing the Trial Court and in directing final judgment to be entered against appellee Bowerman, and in not determining this appeal on the theory on which the trial was had in the lower court, because

(a) The only question in the trial of the case in the lower court was the question of statutory liability, while this Court held Bowerman liable for an alleged violation of his common law duty;

(b) Although the pleadings may be broad enough to raise the issue of liability under the rules of common law, yet there was not one scintilla of evidence introduced on such issue;

(c) No opportunity has ever been given this appellee to introduce any evidence on the question of a common law liability, this question not having been raised in the lower court;

(d) The entering of such judgment for approximately $40,000.00 is taking the property of Bowerman without due process of law, he having had no opportunity to be heard on the question of the alleged violation of his common law duty; and

(e) The record shows that the question of the common law liability of appellee Bowerman was raised for the first time on this appeal.

2. This action was tried in the Lower Court on the theory that appellee Bowerman was liable to the bank under the provisions of the United States Revised Statutes, Sections 5147, 5200 and 5239 for knowingly permitting a violation of the National Banking Act, and not on the theory that he had been

negligent in administering the affairs of the association, and this Honorable Court therefore erred in decreeing that the appellee Bowerman was liable to the Bank under the rules of the common law for all damages suffered because of the excess loans to the Pollards, Brown and Salmon Lumber Company, because an action can not be tried on one theory in the lower Court and reversed on another theory in the Appellate Court.

3. The case having been tried in the lower Court on the theory of a statutory liability only on the part of the appellee Bowerman, and there being no evidence that Bowerman knowingly violated or knowingly permitted to be violated any of the provisions of such statutes and without such knowing violation there can be no liability on the part of appellee Bowerman to the Bank on the theory on which this case was tried in the lower court, this Honorable Court therefore erred in reversing the decree of the lower Court and in directing final judgment against the appellee Bowerman.

4. The bill was dismissed as to the appellee Bowerman without the introduction of any evidence in said cause on his behalf, and this Honorable Court therefore erred in directing final judgment against him and in not remanding the cause and permitting appellee Bowerman to introduce evidence on his behalf in support of the issues made by his denial that he was a director of the Bank subsequent to the 1st day of July, 1910 (p.41 Record), and by his affirmative defense on page 52 of the record that he had

resigned as a director of the Bank on or about the 1st day of July, 1910.

5. From an examination of the record, it is clear that the case was not fully developed in the Trial Court because there were issues made by the pleadings upon which there was no evidence or findings by the lower Court, and this Honorable Court therefore erred in directing final judgment against the appellee Bowerman and in not remanding said cause for a new trial, because a new trial should always be granted where there are material issues upon which there is no evidence or findings.

ARGUMENT.

Upon reading the Bill (pp.7-28 of the record) it seems clear that it is bottomed on a violation of the Federal Statutes, as there are only two places in the Bill (par. VII and XI) that do not relate wholly to a violation of such statutes, and not only this but the record shows, as hereinafter pointed out, that the case was tried by counsel for appellant, counsel for appellee Bowerman, and by the lower court on the theory of a statutory liability only, which involves the rule that a cause having been based and tried on that theory should not on appeal be determined on a wholly different theory.

This rule is well stated in Matheison v. St. Louis & San Francisco Ry. Co., 219 Mo. 542, 118 S. W. 9, an action for damages under a statute in which, after a trial of the case, it was held on appeal that the complaint did not state a cause of action under such

statute, and the court in holding that there could not be a change of theory in the Appellate Court where counsel for appellants contended that the complaint and the record would support a judgment under the rules of the common law, says:

> "Counsel for respondent seeks to avoid the result of the conclusions reached in paragraph one of this opinion (that the petition did not state a cause of action under the statute) by insisting that the petition states a good cause of action under the common law, and that he is entitled to recovery independent of the statute pleaded.
>
> "In our opinion, that contention is untenable; and it is apparent from reading the petition that the suit is bottomed upon the statute, and no attempt whatever was made to state a cause of action under the common law. The record also shows that the case was tried upon that theory, and he should not be permitted to change front in this court."

And also in San Juan Light & T. Co. v. Requens, 224 U. S. 89, 97, 56 L. Ed. 680, 683, an action that was tried on one theory in the lower court and in which it was urged on appeal that the case should be reversed on a different theory, the court says:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

This case was based and tried upon the theory of a violation of Sections 5147, 5200 and 5239 of the Revised Statutes of the United States, and while it may be, because of the allegations of general negligence in paragraphs VII and XI of the Bill as above stated, that it justifies the construction placed upon it by this Court, yet the whole record clearly shows that the appellant, the plaintiff, was relying upon the alleged violation of the statutes relative to National Banks, and that the motion of appellee Bowerman to dismiss the Bill as against him (p. 319, record) shows that he was also trying the case on the theory of a statutory liability, and knowingly permitting the officers of the Bank to violate the National Banking Act, and the decision of the lower Court in dismissing the Bill as to appellee Bowerman (p. 132, record) shows that so far as the Court was concerned the case was tried to it on the theory of statutory liability only.

On page 11 of the record, appellant in his Bill charges that the defendants Bowerman and others, and each of them

> "knowingly permitted and assented to the making of loans by the officers, agents and servants of the First National Bank of Salmon far in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby large sums of money belonging to the stockholders and depositors of said Bank became wasted and lost."

This is the sum and substance of the whole charge against the defendants excepting that allegation heretofore mentioned in paragraphs VII and XI and all the proof and evidence was directed to the support of such charge.

The Court was clearly of the opinion that the plaintiff was relying upon the charge of a knowing violation or knowingly permitting a violation of the statutory duty, and not a violation of the common law duty.

After reciting on page 111 of the record that there are five general charges of misfeasance, the Court then quotes from Sections 5147 and 5239 R. S. U. S., and on page 112 of the record says:

> "*Considering the nature of the wrongdoing charged*, it is thought that these statutory provisions, rather than the general rules of the common law, furnish the measure of the defendants' duty and responsibility."

The Court then proceeds to discuss the liability of the defendants for purchasing the business of Langsdorf and Company because of which purchase it was contended that there had been a violation of the National Banking Act, since there were certain loans taken over which were in excess of loans permitted to be made to any one person under the provisions of the National Banking Act, but the Court, in holding that there was no liability, on page 113 of the record says:

"The mere fact that as a part of the assets so purchased there were loans which in amount exceeded the limit to which National Banks are confined, is quite immaterial (citation). Assuming that such loans were retired when they fell due, *there was no semblance of a violation of the National Banking Act.*"

Clearly, had the Court been considering the liabilities of the defendants from the standpoint of negligence in administering the affairs of the Bank, it would not have said in holding that there was no liability because of the purchase of Langsdorf and Company "there was no semblance of a violation of the National Banking Act."

The appellants further contended that the appellees were liable for making a dividend on the 1st day of July, 1910, but the Court again, in holding that there was no liability on account of this dividend, first says on page 114 of the record:

"If the defendant is liable at all in this action, he is liable for the whole amount of this dividend on the theory that disregarding the obligations of his trust, *he knowingly violated the provisions of the law.*"

And further says on page 116 of the record:

"I am satisfied that he did not knowingly or intentionally violate the law."

Then, again, the Court in considering the charge that overdrafts had been made in violation of the By-Law of the Bank, says:

"The National Banking Law does not prohibit overdrafts."

If it had appeared to the Court that the case was being tried on the theory of general negligence, it would have been immaterial whether the National Banking Law does or does not prohibit overdrafts.

The greater part of the evidence tending to show negligence is to the effect that loans in excess of the amount permitted by statute were made to a number of individuals and the Court again, in discussing these excess loans, says that:

"These loans, therefore, in so far as they exceeded the amount were in violation of the statute." (p. 120, record.)

The Court, in discussing the liability of Andrews after having concluded that the appellee King was liable for knowingly violating the law, says (p. 122, record):

"While the defendant Andrews participated less actively than King in the management of the Bank, it is thought that his legal responsibility is substantially the same. *The penalty for knowingly permitting a violation of the law is not less than for knowingly violating it.*"

So far as Andrews is concerned, general negligence is not once mentioned in the decision of the lower Court.

The Court, after discussing to some extent the failure of appellee Bowerman to attend the meetings of

the Board of Directors, and if he was not a director as is alleged in his answer to the complaint after the 1st day of July, 1910, it is immaterial whether he ever attended a meeting of the Board of Directors of the Bank so far as this action is concerned, on page 129 of the record, says:

> "Did he (Bowerman) *with knowledge* remain silent and inactive when he should have spoken and made active opposition and *did he thus knowingly assent to or knowingly permit the loans to be made.*"

And again on page 130 of the record, the Court, after discussing the evidence to the effect that these excess loans on which this Court has held that the appellees are liable did not appear upon the discount and loan register required to be presented to the Board of Directors at their monthly meeting, and after saying that such a system of bookkeeping, if not designed to conceal, would in effect enable officers to make excess loans and to withhold knowledge from the Directors, unless they made an examination of the accounts of each individual depositor, says:

> "Doubtless, appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all the Directors *must have had knowledge thereof and assented thereto.*"

And in finally dismissing the Bill as to appellee Bowerman, the Court, on page 132 of the record, says:

> "It cannot be said of him (Bowerman) that he knowingly permitted the loans to be made."

Clearly, if it had been urged in the lower Court that the defendants, and especially the appellee Bowerman, was liable to the Bank for negligence in administering the affairs of the Bank, and therefore under the rules of the common law, Judge Dietrich would have in some manner passed upon this question. But nowhere in the whole decision is there any discussion in any manner of the liability of the defendants or any of them for general negligence, but the whole decision turns upon the question of a knowing violation or knowingly permitting a violation of the National Banking Act. It is incredible to think that Judge Dietrich would not have in some manner passed upon the question had it been urged in the lower Court.

Counsel for appellant, after introducing in evidence the minutes of the Bank showing the by-laws in question and the election of directors and also the oaths of the officers, and there is not one bit of evidence to the effect that appellee Bowerman was elected a director in January, 1911, nor is his oath of office for that year in evidence, his last oath of office being the one taken in January, 1910, opened his case by asking the following question (p. 154 record), in connection with the buying of the Langsdorf and Company bank:

> "Now please read, Mr. Biscoe, the loans so taken over which were in excess of $5,000.00 to any one individual, or firm or company."

to which question objection was made by counsel for appellee Bowerman that they were not charged with taking over such excess loans, and Mr. Budge, counsel for appellant, on the same page says that the purpose of asking such question was

> "To show the date when the mismanagement commenced and as charging the *defendants with knowledge*, either actual or constructive of the mismanagement of the Bank. * * * and just simply for the purpose of showing that the Bank here was making *loans in excess of its statutory limit*, and thereby mismanaging the bank."

This clearly shows that counsel was relying upon a knowing or knowingly permitting a violation of the National Banking Act, and the Court, after sustaining the objection to the question, says on page 156:

> "You understand that I do not sustain this objection upon the ground that you cannot introduce evidence of similar acts to those charged, *for the purpose of showing intent and knowledge*, but I do not conceive that the taking over of the assets of this bank would involve transactions of a similar nature. I see nothing wrong in taking over the assets of this Company, even though those assets may have involved loans in excess of $5,000.00."

From an examination of pages 158 and 159, it is clear that both counsel for appellant and the Court were assuming that the action was one for violation of the National Banking Act, and on page 157 counsel for plaintiff introduced in evidence a letter from the Comptroller of the Currency to the First National Bank showing that these loans taken over from Langsdorf and Company were excess loans and finally, on page 162 of the record, a large number of loans which were in excess of the amount permitted by law was read into the record, and, as stated by counsel for plaintiff, the purpose of such was to show that defendants had either actual or constructive knowledge of the violation of the National Banking Act. And again, on pages 219, 220 and 221, it is clear from reading the remarks of counsel for both plaintiff and appellant, and the testimony of the witness, that counsel for appellant was relying upon a violation of the statute by making excessive loans, and on page 290 of the record counsel for plaintiff or appellant asked leave to amend his Bill to show that a loan of $6,250.00 was an excess loan, and at the close of appellant's case appellee Bowerman, through his counsel, made a motion to dismiss the Bill as against him in the following words (p. 319 record):

> "I move to dismiss the Bill as to the defendant Bowerman because they have not in anywise brought him within the terms of Section 5239 of the Revised Statutes of the United States as interpreted by the Courts of the United States. I can present it very briefly."

This motion to dismiss is very much qualified, clearly showing that counsel for appellee had assumed that the case had been tried on the theory, so far as appellee Bowerman was concerned, that he had knowingly permitted a violation of the National Banking Act. The Court makes no comment of any kind on this motion, neither does counsel for appellant. It is inconceivable that had the action been tried on any other theory than on a theory of a violation of the National Banking Act, that both the Court and counsel for appellant would have in no manner commented upon qualification of the motion to dismiss of counsel for appellee Bowerman, and the Court, on page 132 of the record, in dismissing the Bill as to Bowerman, says:

> "But upon the whole, I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he *knowingly permitted* the loans to be made."

If counsel for appellant had been relying upon a violation of the common law duty, surely the Court would in some manner have discussed this question as to appellee Bowerman, rather than discussing the question as to whether the evidence was sufficient to show that appellant had made a case against Bowerman by showing that he had knowingly permitted the statute to be violated.

There are many other instances in the record which tend to show that the action was tried on the

theory of a knowing violation of the statute or knowingly permitting the National Banking Act to be violated so far as appellee Bowerman is concerned, and standing alone there may be some evidence which would tend to support a theory that the case had been tried as for liability by reason of general negligence, but when the whole record is considered, the only conclusion that can be drawn therefrom is the one that the action was tried in the lower Court on the theory that appellee Bowerman had knowingly permitted the National Banking Act to be violated and on this theory only.

When an action has been tried in the lower Court on one theory, the decree of such Court cannot be reversed in the Appellate Court on a different theory. The injustice of permitting a party to an action to try his case on one theory in the lower Court and then when the action has been dismissed as to a defendant to permit such party to appeal and contend on appeal that the record will support a reversal of such decree on an entirely different theory, is so clear that it is scarcely necessary to cite authorities to that effect, and all the authorities uniformly hold that a party cannot make one case by his Bill in the lower Court and another by it in the Appellate Court.

In United States v. Kettenback, 208 Fed. 209, 213, 125 C. C. A. (9th Circuit) 409, it was contended by complainant on appeal that the decree should be reversed and the patents declared fraudulent and void on the single ground that the evidence established the fact that the entrymen applied to purchase

the lands described in their entries for the purpose of speculation, while in the Lower Court the case was tried on the theory that at the time the entrymen made application to purchase the lands described in their entries they had made agreements with certain persons by which the title to the lands which they were to acquire from the United States should enure to the benefit of persons other than themselves; and the court in holding that the decree should not be reversed on appeal on a theory on which the case was not tried below, although the record would support a reversal on a theory on which case was not tried, says:

> "Whether this charge was true or not was the question at issue in the court below, and to this issue (argument that title should enure, etc.) the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals. It is this question, and this question alone, we must determine with respect to the 61 patents assailed in these cases."

This court, in line with all other courts, in its decision in the Kettenback case, has therefore held that, although the record will support a reversal of a decree on a theory on which the case was not tried in the Lower Court, yet the decree of the Lower Court in order to be reversed by the Appellate Court must be reversed on the same theory on which the action was tried.

In 3 Corpus Juris, 718, Sec. 618, the author in dis-

cussing the subject of changing the theory of the case on appeal, says:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review."

And again in 3 Corpus Juris, 725, the author says:

> "The rule applies also to actions or proceedings under statutes, so that, where an action or proceeding is treated in the trial court as having been brought under a particular statute, that theory will be adhered to on appeal. *And where an action is tried as based on a statute, it will not be treated, on appeal, as an action at common law.* (Our italics.)

In Illinois R. R. Co. v. Eagan, 203 Fed. 937, 939, 122 C. C. A. 239, the court said:

> "Nor is it permissible for one who tries his case on one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory."

In Conrad v. Hausen, 171 Ind. 43, 85 N. E. 710, 713, the court in a case tried on the theory that the petition presented to the Lower Court was drawn under one statute, and where it was urged on appeal that the sufficiency of the petition should be determined by the provisions of another statute, says

> "It is true, also, that when a case has been tried upon a certain theory in the trial court that theory must be adhered to on appeal."

In Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co., 114 Fed. 133, 144, 52 C. C. A. 95, the court says:

> "It is too late for the plaintiff's, after the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery, and to insist that the defendant was liable for a fire set within the barn, because in the trial of the real issue which they presented some testimony crept into the record, upon which they asked no instruction, and to which they do not seem to have called the attention of the court at the trial, which might have warranted a recovery on account of a fire set within the barn. One may not try a case upon one theory, and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below. Insurance Co. v. Frederick, 58 Fed. 144, 149, 7 C. C. A. 122, 127, 128, 19 U. S. App. 24, 34; Walker v. Collins, 59 Fed. 70, 72, 8 C. C. A. 1, 3, 4, 19 U. S. App. 307, 311, 312; Speer v.

Board, 32 C. C. A. 101, 88 Fed. 749, 753; Burbank v. Bigelow, 154 U. S. 558, 14 Sup. Ct. 1163, 19 L. Ed. 51; Railroad Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; Horne v. George H. Hammond Co., 18 C. C. A. 54, 71 Fed. 314."

In Missouri, K. & T. Ry Co. v. Wilhoit, 160 Fed. 440-3, the Court says:

"We must, therefore, give effect to the settled rule that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review. Epperson v. Postal, etc. Co., 155 Mo. 346, 50 S. W. 795, 803, 55 S. W. 1050; Central Vermont R. R. Co. v. Soper, 8 C. C. A. 341, 351, 59 Fed. 879; Lesser Cotton Co. v. St. Louis, etc. Co., 52 C. C. A. 95, 114 Fed. 133; Baker v. Kaiser, 61 C. C. A. 303, 126 Fed. 317; Chicago, Milwaukee & St. Paul Ry. Co. v. Voelker, 65 C. C. A. 226, 233, 129 Fed. 522, 529, 70 L. R. A. 264; Cook v. Foley, 81 C. C. A. 237, 248, 152 Fed. 41, 52; New York etc. Co. v. Estill, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; 2 Cyc. 670."

In Benton Land Co. v. Zietler, 182 Mo. 251, 70 L. R. A. 94, 98, the court says:

"The case was not tried in the circuit court upon any such theory, and no such issue was raised in that court, and cases must be tried in

this court upon the same theory and issues upon which they were tried in the lower court."

In State ex rel Holgate v. The Superior Court of Pierce County, 52 Pac. 522, 19 Wash. 114, the court says:

"And we have uniformly held that we would determine a case here on the theory on which it was tried below."

In Walker v. McNeil, 17 Wash. 582, 50 Pac. 518, 521, the court says:

"It would be at variance with the view often expressed by this court to consider a cause brought here upon another or different theory than that presented to the trial court."

In Meals v. De Soto Placer Min. Co., 33 Wash. 302, 74 Pac. 470, the court says:

"And this court has uniformly held that causes here will be tried on the theory upon which they were tried in the court below."

On appeal a case cannot be heard on a theory on which it was not presented in the trial court. See: 1. Dec. Digest, Appeal and Error, Section 171 (1), and particularly the following cases:

Brockenbrough v. Champion Fibre Co., 176 Fed. 840, 100 C. C. A. 310.

Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23, 106 C. C. A. 225.

Ehmen v. City of Gothenburg, 200 Fed. 564,

City of Charlotte v. Atlantic Bitulithic Co., 228 Fed. 456, 143 C. C. A. 38.

Wetzel & T. Ry. Co. v. Tennis Bros. Co., 75 C. C. A. 226, 145 Fed. 458, 7 Ann. Cas. 426.

Durfee v. Harper, 22 Mont. 354, 56 Pac. 582.

Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813.

Overstreet v. Citizens Bank, 12 Okla. 333, 72 Pac. 379.

Neilsen v. Northeastern Siberian Co., Ltd., 40 Wash. 194.

Burbank v. Bigelow, 19 Fed. 51, 74 U. S. 106.

Albany Perf. Wrap. Paper Co. v. John Hoberg Co., 109 Fed. 589.

Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 19 S. E. 665.

Farmers & Merchants Bank v. Zook, 138 Mo. App. 603, 113 S. W. 678.

Stamper v. Venable (Tenn.) 97 S. W. 812.

Industrial Mutual Indem. Co. v. Thompson, 104 (Ark.) S. W. 200, 10 L. R. A. (N. S.) 1064.

Estate of McVay, 14 Ida. 56, 93 Pac. 28.

Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.

Oolitic Stone Co. v. Ridge, 169 Ind. 639, 83 N. E. 246.

Harris v. First Nat. Bank of Bokchito, 21 (Okl.) 189, 95 Pac. 781.

Stratton Cripple Cr. M. & D. Co. v. Ellison, 42 Colo. 498, 94 Pac. 303.

Morrison v. Rochl, 114 (Mo.) S. W. 981.

From what has been stated, it is clear that the attorneys for the parties to this action and the Lower Court tried this action on the theory that the defendants were liable to the Bank for a knowing violation or knowingly permitting a violation of the law. As far as appellee Bowerman is concerned, there is not one iota of evidence that he knowingly violated the provisions of the statute in any manner, nor is there any evidence that he knowingly permitted the other defendants to violate the statutes, nor is there any evidence in the case that he was a director after the 1st day of January, 1911, and there is an issue in the case that he had resigned as a director of the Bank on or about the 1st day of July, 1910, subsequent to which date practically all of the loans were made from which losses were sustained and of which appellant complains.

The attorneys for appellant for the first time on appeal assign as error that the Trial Court erred in not holding the appellee Bowerman liable for failure to perform the common law duty to be honest and diligent. At the close of plaintiff's case, appellee Bowerman, through his attorney, moved for a dismissal of the bill as to him for the reason that plaintiff had not made out a case against him which would bring him within the terms of Section 5239 R. S. U. S. as construed by the courts of the United States. The Court made no comment upon this motion at that time, other than stating that he did not like to pass upon the question without giving it some consideration. Neither did counsel for appellant

make any comment upon it. He should now be estopped to come into this Court and raise the question that the appellee is liable to the Bank for failure to perform his common law duty, when such non-action on the part of the appellant and his counsel resulted in a failure of the appellee Bowerman to put in any evidence in support of his defense to the action, and clearly, if appellee Bowerman can introduce evidence to support the defense set up in the action, such evidence would be a complete bar to any recovery against this appellee by appellant, for the reason that he cannot be chargeable with acts of the other directors of the Bank when he was no longer connected with the Bank.

As we have already shown, the theory of the case cannot be changed for the first time on appeal and all the authorities are uniform to that effect, and therefore the decree of the lower Court, so far as it affected appellee, Bowerman, should be affirmed for the reason that there is no evidence which in any way tended to show that he knowingly permitted any of the provisions of the statute to be violated, nor does this court in its opinion in any way intimate that there is evidence sufficient to warrant the reversal if the complaint is construed as charging a violation of the National Banking Act, as it was construed both by the Court and counsel for the parties to the action in the trial of the case.

This Court, in its decision, held that appellee Bowerman was liable to the Bank under the rules of the common law for failure to perform his duty to be

honest and diligent in managing the affairs of the Bank (pp. 8 and 15 of the Opinion), and in so holding, departed from the theory on which the case was tried in the lower Court and adopted a theory of liability which was urged by appellant for the first time on appeal. The question whether appellee Bowerman was guilty of negligence in acting as a Director of the Bank is a question of fact upon which he has had no opportunity to be heard, because this question, on the theory on which the case was tried in the lower Court was not in issue. Had such been the issue, the appellee Bowerman might well have introduced his evidence in support of his defense, rather than making his motion to dismiss the appeal as he did, which motion so far as a statutory violation is concerned is upheld by this Court and the Trial Court.

The issues as to whether plaintiff was negligent in managing the affairs of the Association, or whether he knowingly permitted the National Banking Act to be violated, are so radically different, that justice demands that the case in the Appellate Court be heard upon the same theory on which it was tried in the lower Court, for the reason that where it is urged for the first time upon appeal that the action is on one theory, rather than the one on which it was tried appellee has had no opportunity to be heard on such theory on which the case was not tried.

This Court, however, without passing upon the question whether the motion was rightfully granted upon the theory on which the case was tried, now holds that the bill is broad enough to charge a viola-

tion of the common law duty, to be honest and diligent (p. 8 of the Opinion), and that appellee Bowerman was guilty of "such inattention to duty which was imposed upon him of exercising a reasonable supervision over the conduct of those in charge of the Bank that he too is liable to the same extent as are King and Andrews, and "that the liability of defendants King and Andrews, being for gross mismanagement, should have been measured in accordance with the rule of the common law, rather than solely according to the statute." But this question of *inattention* to duty was not the issue in the case so far as Bowerman was concerned, but the sole issue was whether he had knowingly permitted the National Banking Act to be violated, and it is now unjust to reverse the decree against him on the theory that a case has been made out against him because of inattention to duty imposed upon him.

And again this Court, with only the plaintiff's side of the case before it, directs the lower Court to enter judgment against Bowerman for all loss to the Bank, regardless of the question of proximate cause of the loss and regardless of the fact that the case was only partially developed and that no evidence on the part of appellee Bowerman has been introduced, and that there are issues (that appellee Bowerman was not a director of the Bank at the time of the loans charged in the bill from which losses resulted were made) made by the pleadings upon which there is no evidence, and no findings. Under such circumstances, where the Trial Court has held that the bill will

be dismissed because a case was not made out against Bowerman on the theory on which it was tried, it should not be held on reversal of such an order by the Appellate Court that the appellee is not entitled to be heard on his defense which are issues on the pleadings.

In Allen v. Parmalee, 142 Fed. 354, 363, such a contention was made where at the close of plaintiff's case defendant moved for a dismissal, which motion was granted, but the court in reversing the order of dismissal and granting a new trial, says:

> "It thus appears, in our opinion, that the Circuit Court erred in instructing the jury to find for the defendants, and that as the case then stood the court should have instructed the jury to find for the plaintiffs. The counsel for the plaintiffs in error ask us to reverse the judgment of the Circuit Court and to render judgment here in favor of the plaintiffs for the land in controversy. They urge that, if the defendants have any color of claim of title, they declined to show it when they had the opportunity and might have done so, without in any degree compromising their rights, so that the case on all of the existing facts pertinent thereto might have been adjudicated, and that to permit another trial with opportunity to introduce such evidence as they may have, if any, is to tolerate experimenting with the court by a motion to instruct without introducing evidence, and thus to bring about delay, cost, expenses, and trouble incident to two

trials and two appeals, in case the judgment of this court should not be in favor of the defendants. There is much force in what they suggest, but we are not willing to go that far in this case. Beside the general issue submitted in the technical plea of not guilty, various of the defendants, if not all of them, plead the statute of limitation as to specific portions of the land. See Hodges v. Easton, 106 U. S. 408, 413, 1 Sup. Ct. 307, 27 L. Ed. 169.

"The judgment of the Circuit Court is reversed, and the case is remanded, which directions to award a new trial and proceed therein according to law and following the views herein expressed."

Under these facts, clearly Bowerman, if this Court should hold in view of the allegations in Paragraphs VII and XI of the bill that the issue of negligence was an issue in the case, which it is not as we contend, because of the theory on which the case was tried in the lower Court, is entitled to a new trial to have the question of his negligence and the question whether he was a director at the time the loans were made passed upon in the light of all the evidence. Even if it were admitted, which it is not, that Bowerman was a Director up to the time the Bank closed its doors, still it is a question of fact whether his failure to attend meetings of the Board of Directors is the proximate cause of the loss. He may be able to show that, regardless of any acts he might have done,

King, Andrews and Lottridge might have made the loans from which the loss resulted.

The motion of appellee Bowerman to dismiss the bill was made in good faith, and the motion was sustained by the Trial Court, and so far as appears from the opinion in this case with reference to the issue of his knowingly permitting the statute to be violated, that order of the lower Court still stands and has been acquiesced in by this Court. Under such circumstances, justice demands that at least a new trial be granted.

In the City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, 104, 37 L. Ed. 380, 385, where all the facts had been found by the Trial Court, which is not the case here, the appellant only having presented his side of the case, the appellate court, in granting a new trial, says:

> "It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed. It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. *At the same time if for any reason justice seems to require it, the court may simply reverse and direct a new trial.* Indeed, this has been done, under special circumstances, in cases where there were no findings of facts or agreed statement, or where that which was presented was obviously defective." (Our ilalics.)

In Kossuth Co. State Bank v. Richardson, 141 Iowa 738, 118 N. W. 906, an action in equity to foreclose a mortgage, the Court says:

> "Ordinarily a reversal upon hearing *de novo* terminates the litigation, the opinion indicating the character of the decree to be entered; but *whenever essential to effectuate justice an appellate tribunal may remand to the trial court for such further proceedings as the circumstances of the case require.* * * * The authority of this court in its discretion to remand for introduction of additional testimony cannot be doubted." (Our italics.)

The courts, even in equity cases, have uniformly held that where there were issues in the case upon which there was no evidence, and even in cases where a non-suit had been granted at the instance of the appellee, a new trial should be granted.

In Shetler v. Stewart, 133 Ia. 320-5, 110 N. W. 582, an equity case to quiet title to land in which the defendants moved to strike certain evidence of plaintiff, and on such motion being granted moved to dismiss the case, which latter motion was granted, the court on rehearing says:

> "Now, if no further investigation were allowable, the effect of the reversal in this court would be to leave the plaintiff with a prima facie case made out, while the defendants would be barred from bringing forward the matters pleaded in defense by them. Such a result we think ought

not to obtain. True, as the case was in equity and therefore triable *de novo*, in this court, defendants might have gone on, and in the face of the ruling in their favor introduced their evidence. But their failure to do so is not wholly inexcusable under the circumstances. We think the case should be remanded for further hearing and trial, either party to have the right to bring into the record such further evidence as they may be advised is material and competent. This is the proper practice."

In Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159, a law case in which a non-suit was granted and the plaintiffs appealed, it was held that on reversal a new trial should be granted.

In Massey v. Rae, 18 N. D. 409, 121 N. W. 75, an action to set aside a deed as fraudulent where at the close of plaintiff's case a motion to dismiss was granted, it was held that a new trial should be granted under a statute providing that the Supreme Court could grant new trials in furtherance of justice.

In Robson v. Hamilton Co., 41 Ore. 239, 69 Pac. 651, 653, the court in remanding an equity case for further proceedings where defendant had failed to introduce any evidence because of a ruling excluding evidence of plaintiff, and a motion of defendant to dismiss at the close of plaintiff's case being granted, the court says:

"Suits in equity are tried anew on appeal, and a final decree is usually rendered in this court,

and a cause should not be remanded to the lower court for further consideration unless necessity demands it. It was incumbent upon the defendants to present their testimony when they had an opportunity, but their failure to do so was evidently induced by a reliance upon the court's excluding competent evidence, to the introduction of which their objections were sustained; and, assuming this to be so, the cause will be remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion."

In Baker v. City of Akron, 145 Ia. 485, 122 N. W. 926, 30 L. R. A. (N. S.) 619, a case tried to the court as in equity, where the defendants had tried the case upon the theory of non-liability, the court, in granting a new trial, said:

"We shall not undertake on the appeal to fix the amount of plaintiff's damage. The case was not tried with any great degree of care on this issue, for the evident reason that defendants were proceeding on the theory of non-liability. For this reason, we shall remand the case for a retrial upon the issues as to the amount of damages to which plaintiff is entitled, and for further proceedings not inconsistent with this opinion."

In the case at bar, the appellee Bowerman moved to dismiss his appeal for the reason that a case had not been made against him on the theory on which the action was tried and failed to introduce any evidence. But in the Baker case certain evidence on the part of

the defendants had been introduced, still the court stating that the defendants relied upon the position that there was no liability and had not introduced any evidence in support of their defense with any degree of care, remanded the case for a new trial. Petitioner's case is clearly a much stronger case than the Baker case, for the reason that the appellant should have spoken when the motion was made if he was contending that the action was one for violation of the common law duty to be diligent, rather than an action for permitting the statute to be knowingly violated.

In Gaither v. W. A. Gage & Co., 82 Ark. 51, 100 S. W. 80, an action to quiet title to lands where the case had not been fully developed and the bill was dismissed and the complainants appealed, the court says:

> "The decree must be reversed as to both these tracts of land, but, as the case was not fully developed below, we do not think it would be just to direct a decree in favor of appellants. The learned Chancellor and counsel for appellees were evidently misled by the change in the pleading after the filing of the several answers, whereby the lands were alleged to be in the possession of appellees, though the petition had originally alleged that the lands were wild and unimproved. It is apparent that the case was tried below upon the theory that the lands were unimproved and uninclosed. It would therefore be unjust not to give an opportunity to develop that fact by proof."

In Wagner v. Arnold, 76 Ark. 162, 88 S. W. 852, an action to quiet title to lands where the defendant appealed from the decree against him, the trial court having failed to make a finding on an issue made by him, it was said on appeal:

> "Inasmuch as it appears that the lower court did not pass upon and determine whether this claim of appellee to south half was superior to the title of appellant we will remand cause as to that claim, with directions to lower court to proceed, if the plaintiff so desire to pass on that issue."

In Perry v. Blakey, 5 Tex. Civ. App. 351, 23 S. W. 804, a statutory action of trespass to try title, tried by the court without a jury, where plaintiff was nonsuited at defendant's request, certain evidence on defendant's motion having been rejected on reversal, the court says:

> "While it is ordinarily the rule to make a final disposition in this court of cases tried by the court below without a jury, in as much as the introduction of the administrator's deed would have presented an entirely different state of facts than that upon which the case was decided, and it being possible that the defendant had evidence of title in himself which he would have introduced had such a state of evidence confronted him, we think it proper to reverse and remand the cause for another trial, and it is so ordered."

In Fordyce v. Vickers, 99 Ark. 500, 138 S. W. 1010, an action to quiet title, where both sides introduced evidence but the bill was dismissed on an issue of law, the court on reversing the trial court says:

> "Ordinarily a chancery case which is appealed to this court will be tried here *de novo*, irrespective of how the chancellor reached his conclusion where the evidence has been fully developed. But where the chancellor has decided a cause upon an issue involving virtually a question of law, in which we find that he was in error, and leaves undecided other issues in the case involving questions of fact, which he is probably better able to pass upon by reason of his greater familiarity with the circumstances and conditions surrounding such issues, this court in its discretion may remand the case for his decision on said issue of fact."

In Gillespie v. Magruder, 92 Miss. 511, 46 So. 77, 78, an action to establish a boundary line where the trial court failed to pass upon an issue made by appellants' answer that she had been in adverse possession of certain lands, the court says:

> "Since it appears from the record that the chancellor did not consider this question when on trial before him, his attention being addressed to another feature of the complaint, and in order that the parties may be given full opportunity to take testimony on all the issues in this case, we think that the case should be reversed and re-

manded, with leave to either party to take further testimony and fully develop all contentions, and it is so ordered."

The rule is clear that a new trial should in all cases like the one at bar be granted where the case has not been fully developed, and where there are issues undisposed of either by the evidence or the findings of the Trial Court.

In this case, the defendant denies that he was a director of the Bank at any time subsequent to the 1st day of July, 1910, (p. 41 of the Record), after which date practically all the loans from which losses to the Bank resulted were made, and appellee Bowerman also alleges in his answer to the complaint that on or about the 1st day of July, 1910, (p. 54-5 of the Record), he resigned as Director of the Bank. There is no evidence in the case upon these allegations one way or another, neither does the evidence of plaintiff support the allegations of the bill that appellee Bowerman was a director at all times from the organization of the Bank to the date its doors were closed in June, 1911. The evidence of plaintiff, or appellant, shows that Bowerman was elected a director in January, 1910, and took his oath of office, and that is the last evidence presented by the appellant showing that Bowerman continued to act as a director, nor are there any findings of the Court in reference to these issues.

Justice, under the circumstances of the trial of this case, demands that this petitioner, at least, be

given an opportunity to be heard on these issues, because if they are determined in his favor, clearly, there can be no liability, and, because the appellant is now estopped by reason of his inaction in the Trial Court at the time the motion to dismiss was made to urge for the first time upon appeal that the appellee Bowerman is liable to the Bank for his inattention to his duty to exercise a reasonable supervision over the management of the Bank.

It is clear from the evidence that this appellee is not liable to the Bank on the theory on which the case was tried in the lower Court, because no evidence of any kind was introduced showing that he knowingly violated, or knowingly permitted to be violated any of the provisions of the National Banking Act. While there has crept into the evidence certain testimony which standing alone, tends to support the theory urged by the appellant, that appellee Bowerman should be held liable on account of his alleged negligence, yet, as we have shown, this theory was not urged in the Trial Court and in order that justice may be done the decree of the lower Court should be affirmed or at least a new trial granted.

WHEREFORE, your petitioner respectfully submits that a rehearing should be granted in this case for the reason that this Honorable Court erred in reversing the decree of the lower Court on a theory different from that on which the case was tried and decided in the lower Court, and for the further reason that if it should finally be held that the lower Court erred in dismissing the Bill as to appellee Bow-

erman, that this Honorable Court erred in directing the entry of final judgment against this petitioner and in not remanding the cause for a new trial, because the case was not fully developed, and because there are issues made by the pleadings that your petitioner was not a director of the Bank at the time the alleged loans were made and had resigned as such director before the alleged mismanagement took place, upon which issues no evidence was introduced and no findings made, and because the appellant had gained by his action an unconscionable advantage in trying his case on one theory and insisting that a decree against him in the Trial Court should be reversed on appeal on another and inconsistent theory.

Respectfully submitted,

RICHARDS & HAGA,

Solicitors for Petitioner, Guy E. Bowerman.

State of Idaho,
County of Ada,—ss.

I, James H. Richards, of Counsel for Petitioner above named, do hereby certify that in my judgment the foregoing Petition is well founded and that it is not interposed for delay.

JAMES H. RICHARDS,

Solicitor and of Counsel for Petitioner, Guy E. Bowerman.